STATE OF MICHIGAN

COURT OF APPEALS

CASTLE MANAGEMENT, ROBERT E. MOON, and STEVEN L. MORRIS,

Plaintiffs-Appellees,

v

IRVING A. AUGUST, Individually and as Trustee of the IRVING A. AUGUST Revocable Living Trust, and on behalf of EYL ASSOCIATED LIMITED PARTNERSHIP, and ERIC YALE LUTZ, Individually and as Trustee of the ERIC Y. LUTZ Irrevocable Trust,

Defendants-Appellants.

UNPUBLISHED
September 8, 2005

No. 253822
Oakland Circuit Court
LC No. 2002-045088-CZ

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Defendants Irving A. August and Eric Yale Lutz[1] appeal as of right from the trial court's judgment granting plaintiffs Robert E. Moon, Steven L. Morris, and Castle Management's motion for summary disposition pursuant to MCR 2.116(C)(9) and confirming an arbitration award in favor of plaintiffs. We affirm.

I. Facts and Procedural History

This case arises from a dispute between plaintiffs and defendants concerning their rights and interests in a general partnership. When the EYL Associated Limited Partnership was formed, Mr. Lutz was the managing partner and held the largest share of general and limited partnership interests. Mr. Moon and Mr. Morris each owned smaller shares. In 1989, Mr. Lutz pledged his interest in EYL's cash flow distributions as security on a loan, which was later foreclosed. Mr. August purchased Mr. Lutz's interest in EYL's cash flow distributions at the foreclosure sale. In 1995, Mr. Lutz resigned as managing partner, and Mr. Moon and Mr.

[1] As the defendant trusts have no interests separate from those of the individual defendants, we will refer to Mr. August and Mr. Lutz and defendants throughout.

Stevens formed Castle Management to manage EYL. Mr. Lutz subsequently filed for bankruptcy in 1996, and certain of his partnership interests passed to the bankruptcy trustee. Mr. August purchased these interests from the trustee, believing that he took Mr. Lutz's full general and limited partnership interests in EYL.

In 1998, Mr. Moon and Mr. Stevens paid themselves a large commission after negotiating a lease on a medical office building owned by EYL. Defendants objected to this disbursement and plaintiffs asserted that neither had standing to raise these complaints. They claimed that Mr. Lutz lost his status as partner by filing for bankruptcy and that Mr. August held only a beneficial interest in EYL's cash flow. The parties agreed to submit their dispute to binding statutory arbitration pursuant to MCL 600.5001 *et seq.* and MCR 3.602. The arbitrator issued an award in plaintiffs' favor, finding that neither defendant had standing to seek relief from the general partners for breach of the partnership agreement.[2] Defendants unsuccessfully filed a motion for rehearing with the arbitrator, claiming that the arbitrator misconstrued the partnership agreement and made erroneous factual findings. Plaintiffs thereafter filed this action in circuit court to confirm the arbitration award. Defendants opposed confirmation, asserting that the arbitration proceeding was invalid, as the arbitrator failed to take the oath required by MCR 3.602(E)(1) and improperly delegated certain research and opinion-writing tasks to an associate. Plaintiffs moved for summary disposition pursuant to both MCR 2.116(C)(9) and MCR 2.116(C)(10). The trial court granted plaintiffs' motion under MCR 2.116(C)(9), concluding that defendants were precluded from raising affirmative defenses as they were not raised in a timely motion to vacate the arbitration award under MCR 3.602(J).

II. Timeliness of Affirmative Defenses

Defendants argue that the trial court erroneously concluded that their failure to file a motion to vacate the arbitration award within twenty-one days under MCR 3.602(J) precluded them from subsequently raising affirmative defenses to plaintiffs' complaint to confirm the arbitration award. We agree. The proper interpretation and application of a court rule is a question of law, which this Court reviews de novo.[3] The principles that govern statutory interpretation apply equally to the interpretation of court rules.[4] When the language of a court rule is unambiguous, we must follow it as written.[5] We may not read into a court rule any omitted provisions.[6]

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[2] The arbitrator found that, pursuant to the EYL partnership agreement, Mr. Lutz's partnership interests were converted to a beneficial interest in cash flow distributions when transferred to the bankruptcy trustee. Therefore, Mr. Lutz had no interest remaining in EYL and Mr. August had only an interest in cash flow distributions.

[3] *Haliw v Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005).

[4] *Id.*

[5] *Grievance Administrator v Underwood*, 462 Mich 188, 194; 612 NW2d 116 (2000).

[6] *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003).

A circuit court has "three options when an arbitration award is challenged: it may (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award."[7] While MCR 3.602(J) specifically enumerates narrow grounds for vacating an arbitration award, the rule does not specifically provide that failure to move to vacate an award constitutes a waiver of objections to its confirmation. The rule also does not prescribe a time limit in which a party must raise defenses in opposition to confirmation of the award. However, MCR 3.602(I) provides:

> An arbitration award filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered *may* be confirmed by the court, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule.[8]

A trial court may, in its discretion, confirm an arbitration award that was not vacated, corrected, or modified pursuant to MCR 3.603(J) or (K). Therefore, the trial court may consider grounds against confirmation even if the opposing party did not previously move for the vacation, correction, or modification of the award.[9] Accordingly, the trial court erred in denying defendants the opportunity to affirmatively defend against the confirmation of the arbitration award.[10]

III. Merit of Affirmative Defenses

The trial court improperly failed to consider defendants' grounds for opposing confirmation. However, we need not reverse its order confirming the arbitration award, as defendants failed to raise a viable defense. MCR 2.116(C)(9) provides for summary disposition where the "opposing party has failed to state a valid defense to the claim asserted against him or her."[11] Summary disposition is appropriate when, taking all allegations in the pleadings as true, "the defenses are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery."[12]

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[7] *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999); MCR 3.602(I), (J), and (K).

[8] MCR 3.602(I) (emphasis added).

[9] See *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95; 323 NW2d 1 (1982) (holding that the limitations on motions to vacate in the predecessor rule, GCR 1963, 769, did not preclude a defendant from raising grounds to oppose confirmation of the arbitration award).

[10] As we have determined that the trial court improperly failed to consider the merits of defendants' affirmative defenses, we need not consider defendants' alternative argument that their motion for rehearing before the arbitrator tolled the twenty-one-day period prescribed in the court rule.

[11] *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003).

[12] *Id*. at 42 n 4.

Defendants first assert that the arbitrator failed to comply with MCR 3.602(E)(1), which requires that the arbitrator "be sworn to hear and consider the matters submitted and to make a just award according to his or her best understanding." However, the failure to take this oath does not fall under any of the narrow circumstances warranting the vacation of an arbitration award. Accordingly, we can find no reason to conclude that this error should prevent the confirmation of an arbitration award.

Defendants also claim that the arbitrator relied too extensively on an associate to provide assistance in reviewing the case, researching the law, and drafting an opinion. Although the arbitration agreement provides that the arbitrator "shall serve as the sole arbitrator for the final resolution of any and all arbitrable issues," nothing in the agreement prohibits the use of an associate's assistance. The arbitrator in this case assumed full responsibility for the final decision by signing the opinion and issuing it under his name. He, therefore, acted within the scope of the agreement. Accordingly, summary disposition was appropriate pursuant to MCR 2.116(C)(9).

IV. Review of Arbitration Award

As the trial court granted plaintiffs' motion for summary disposition under MCR 2.116(C)(9), it did not consider their motion pursuant to MCR 2.116(C)(10). However, defendants continue to contend on appeal that the arbitrator's opinion was governed by material and substantial errors of fact and law. A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[13] Summary disposition is appropriate only if, after reviewing all pleadings and documentary evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[14]

Parties agreeing to statutory arbitration are conclusively bound by the arbitrator's decision absent very limited circumstances, including where an arbitrator "exceeded his powers" or "refused to hear material evidence."[15] An arbitrator exceeds his or her power by ignoring controlling principles of law or by acting beyond the material terms of the arbitration agreement.[16] In order to support a trial court's determination not to confirm an arbitration award, the error must have been "so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise."[17] Although the refusal to hear

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[13] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[14] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001); *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[15] *Konal*, *supra* at 75.

[16] *DAIIE v Gavin*, 416 Mich 407, 433-434; 331 NW2d 418 (1982).

[17] *Id.* at 443.

material evidence is a ground for vacating an arbitration award,[18] we may not review the award to determine if it was against the great weight of the evidence or was unsupported by substantial evidence.[19] The limited review of an arbitration award precludes courts from "engag[ing] in contract interpretation, which is a question for the arbitrator."[20] Accordingly,

> an allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision. Stated otherwise, courts may not substitute their judgment for that of the arbitrators . . . .[21]

Defendants set forth a detailed analysis of the limited partnership agreements, the parties' deposition testimony, and plaintiffs' business documents, purportedly to demonstrate that the arbitrator erred in finding that neither defendant had standing to sue plaintiffs for breach of the partnership agreement. These arguments challenge the arbitrator's interpretation of the partnership agreement and his review of the evidence, and are, therefore, beyond the scope of judicial review. Accordingly, the trial court could have also granted summary disposition in plaintiffs' favor pursuant to MCR 2.116(C)(10). Defendants have not asserted any grounds that compel this Court to reverse the trial court's order confirming the arbitration award.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

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[18] MCR 3.602(J)(1)(d).

[19] *Belen v Allstate Ins Co*, 173 Mich App 641, 645-646; 434 NW2d 203 (1988); *Donegan v Michigan Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986).

[20] *Konal, supra* at 74.

[21] *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991).